IP 02-0477-C H/K Nelson v IPALCO [3]
Judge David F. Hamilton Signed on 08/11/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NELSON, JOSEPH J,	)	
WYCOFF, MICHAEL,	)	
MEDVESCEK, TONY - ON BEHALF OF	)	
THEMSELVES AND ALL OTHERS	)	
SIMILARLY SITUATED,	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
IPALCO ENTERPRISES, INC,	)	
EMPLOYEES' PENSION COMMITTEE	)	
FOR EMPLOYEES' THRIFT PLAN OF	)	
INDIANAPOLIS POWER & LIGHT	)	
COMPANY,	)	
EMPLOYEES' PENSION COMMITTEE	)	
FOR EMPLOYEES' RETIREMENT PLAN	)	
OF INDIANAPOLIS POWER & LIGHT	)	
COMPANY,	)	
HODOWAL, JOHN R,	)	
HUMKE, RAMON L,	)	
TABLER, BRYAN G,	)	
CALIFAR, MAX,	)	CAUSE NO. IP02-0477-C-H/K
PLUNKETT, STEVE J,	)	
STEINER, TOM A,	)	
WALTZ, GERALD D (DISM 2/4/04),	)	
WILSON, JOHN D (DISM 2/4/04),	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOSEPH J. NELSON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CAUSE NO. IP 02-477-C H/K
	)	
IPALCO ENTERPRISES, INC., *et al.*,	)	
	)	
Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
AND RELATED MATTERS

This class action presents claims arising from the acquisition of IPALCO Enterprises, Inc. ("IPALCO") by The AES Corporation ("AES") in a stock-for-stock exchange. The transaction was negotiated in 2000 and consummated in 2001. Plaintiffs are participants and beneficiaries in the Employees' Thrift Plan of Indianapolis Power and Light Company ("the Thrift Plan"). Indianapolis Power and Light Company ("IPL") is an operating subsidiary of IPALCO and generates and distributes electric power in the Indianapolis area.

Plaintiffs allege that defendant IPALCO and individual IPALCO executives breached their fiduciary duties under section 404 of the federal Employee Retirement Income and Security Act ("ERISA"), 29 U.S.C. § 1104. The Thrift Plan is not a defined benefit pension plan. It is, in the terms of ERISA, an Eligible Individual Account Plan or EIAP. Individual employees could make voluntary contributions toward retirement savings. Most important for present purposes, each individual participant chose how his or her contributions should be invested among nine investment options. One of those options was IPALCO stock. Also, the Thrift Plan authorized IPALCO to match employee contributions, within some limits. The Thrift Plan was designed so that most of those matching contributions were required to be made and held as IPALCO stock.

The background of the case is set forth in this court's decisions denying defendants' motion to dismiss, *Nelson v. IPALCO Enterprises, Inc.*, 2003 WL 402253 (S.D. Ind. Feb. 13, 2003), and granting plaintiffs' motion for class certification, *Nelson v. IPALCO Enterprises, Inc.*, 2003 WL 23101792 (S.D. Ind. Sept. 30, 2003). To summarize, when the AES acquisition closed on March 27, 2001, most of the Thrift Plan's assets were held in the form of IPALCO stock, which was then exchanged for AES stock. Between the closing and July 11, 2001, AES stock traded in a range of $52.00 to $40.35 per share. AES stock then began a steep decline. On September 26, 2001, the stock lost nearly half its value, dropping from $24.25 to $12.25.[1] By March 2002, AES stock traded

[1]AES stock did not experience a dramatic drop in the immediate aftermath of the terrorist attacks of September 11, 2001 and the closure of the stock market for several days. AES closed on September 10th at $29.00 and closed at $27.50 on September 17th, the next day that markets were open. The AES stock prices cited here are taken from Exhibit C to IPALCO's motion to dismiss, Docket No. 36. Courts may take judicial notice of such well-publicized stock price information. *E.g.*, *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 n.8 (2d Cir. 2000).

in a range of approximately $5.00 to $9.00 per share, reflecting a loss of more than 80 percent of its value at the time of the closing.

Plaintiffs assert two claims against the defendants for breach of fiduciary duties under ERISA. Count One addresses the Thrift Plan assets that were invested according to the individual plaintiffs' decisions. Count One alleges that defendants are responsible for plaintiffs' losses resulting from conversion of their individual IPALCO stock holdings to AES stock and the later decline in value. Plaintiffs do not assert that the defendants were guarantors of good investment results with those assets. Instead, plaintiffs offer three theories for finding breaches of ERISA fiduciary duties, all built on the premise that AES was highly leveraged and was a much riskier stock than IPALCO had been. First, plaintiffs contend that after IPALCO and AES agreed to the acquisition, the defendants wrongfully promoted continued investment in IPALCO and in effect AES stock when it was not prudent to allow participants to invest in the riskier and highly leveraged AES stock. Second, plaintiffs contend that after IPALCO and AES agreed to the acquisition, the defendants were imprudent in failing to remove IPALCO and then AES stock as an investment option for participants to choose. Third, plaintiffs contend that defendants breached a fiduciary duty to disclose plainly to plan participants both (a) the increased risk associated with AES stock and (b) the fact that the individual defendants were selling all or nearly all of their own IPALCO stock at the time of the acquisition, both inside and outside the Thrift Plan. Plaintiffs contend that they would have wanted to know that the individual defendants were all leaving the IPALCO–AES ship at the same time they were urging (or at least allowing) plaintiffs to stay on board.

Count Two addresses the Thrift Plan assets that were "new employer matching contributions," which the plan required be held in the form of IPALCO stock. Plaintiffs did not exercise individual control over these investments. They contend the defendants breached their fiduciary duties of prudence and loyalty by allowing these assets to be transformed from relatively safe and stable IPALCO shares to risky and unsuitable investments in AES shares.

Presently pending before the court are the defendants' motion for summary judgment as to all issues, plaintiffs' motion for summary judgment as to liability for breach of fiduciary duty, plaintiffs' motion for summary judgment on a release defense asserted by defendants for many class members, and defendants' motions to strike the testimony of one of plaintiffs' expert witness and to strike the report of another.

I. *Fiduciary Duty Issues*

Both sides have moved for summary judgment as to whether defendants complied with or breached their fiduciary duties under ERISA. Both motions invite what is often called a paper trial. They attempt to capture a complex and extensive factual record that fills several boxes. That factual record details the evolution of the IPALCO–AES transaction and all of the accompanying communications to shareholders and employees, as well as the management of the Thrift Plan through many months of transition.

"[B]ecause summary judgment is not a paper trial, the district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe. The court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). When deciding a motion for summary judgment, the court must decide whether the evidence presents a sufficient disagreement to require submission to a trier of fact or whether it is so one-sided that one side must prevail as a matter of law. *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 637 (7th Cir. 2001). The court considers those facts that are undisputed, but the court must also view additional evidence in the light reasonably most favorable to the non-moving parties, and the court must give the non-moving parties the benefit of any favorable inferences the evidence might reasonably support. See Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999).

Thus, in considering a motion for summary judgment, the court does not determine the most accurate account of the facts. Instead, the parties' motions require the court to consider the evidence through two lenses. When considering the defendants' motion for summary judgment, the court must give the plaintiffs the benefit of all conflicts in the evidence and the benefit of all reasonable inferences that might be drawn from the evidence in their favor, even if the evidence or the inferences seem improbable. When considering the plaintiffs' motion for summary judgment, the roles are reversed. Under these standards, neither side's version of the facts can be said to reflect reality very well. Each side's motion for summary judgment asks the court to consider not the complete set of relevant facts but a truncated and hypothetical set of facts.

In considering the motions for summary judgment on the fiduciary duty issues, it is also critical to recognize that the law of ERISA fiduciary duty as applied to EIAPs, and especially to EIAP investments in employer stock, is emerging, controversial, and highly fact-sensitive. The views of the First Circuit are applicable here, from a recent opinion reversing the grant of a motion to dismiss in a case raising closely related issues:

> Because the important and complex area of law implicated by plaintiffs' claims is neither mature nor uniform, . . . we believe that we would run a very high risk of error were we to lay down a hard-and-fast rule (or to endorse the district court's rule) based only on the statute's text and history, the sparse pleadings, and the few and discordant judicial decisions discussing the issue we face. Under the circumstances, further record development – and particularly input from those with expertise in the arcane area of the

> law where ERISA's ESOP provisions intersect with its fiduciary duty requirements – seems to us essential to a reasoned elaboration of that which constitutes a breach of fiduciary duty in this context. *Cf. Doe v. Walker*, 193 F.3d 42, 46 (1st Cir. 1999) (vacating a Fed. R. Civ. P. 12(b)(6) dismissal on an issue with "important social and moral implications" and with an undeveloped factual background "in part because further facts may make it unnecessary to decide the hard case but also because the facts are likely to contribute to a more sensitive assessment of what the law 'is' (which, absent decisive precedent, means what it 'should be')").

Lalonde v. Textron, Inc., 369 F.3d 1, 6 (1st Cir. 2004); accord, *In re JDS Uniphase Corp. ERISA Litigation*, 2005 WL 1662131, *8 (N.D. Cal. July 14, 2005) (denying in principal part a motion to dismiss claims that fiduciaries of an EIAP breached duties by allowing investment in employer stock and making employer matching contributions in form of employer stock); see also *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1097 (9th Cir. 2004) (questioning standards applied by Third and Sixth Circuits in similar cases).[2]

The intersection of ERISA fiduciary duties and federal securities law adds to the uncertainty here. Plan participants received proxy statements with detailed information about AES and the proposed transaction. All of the individual defendants reported their insider sales of IPALCO stock under the securities laws. Plaintiffs do not claim that the proxy statement violated

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[2]See also, *e.g.*, *In re Worldcom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423 (S.D.N.Y. 2005) (granting motion for summary judgment by "directed trustee"); *In re Calpine Corp. ERISA Litig.*, 2005 WL 1431506 (N.D. Cal. March 31, 2005) (granting motion to dismiss); *In re Sears, Roebuck & Co. ERISA Litig.*, 2004 WL 407007 (N.D. Ill. March 3, 2004) (denying motions to dismiss in principal part); *In re Enron Corp. Securities, Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 652-79 (S.D. Tex. 2003) (same).

securities law or that the defendants violated securities law regarding insider stock sales. As the Seventh Circuit observed in a recent ERISA case, "if we were to create a new fiduciary duty, as plaintiffs request, we run the risk of disturbing the carefully delineated corporate disclosure laws." *Baker v. Kingsley*, 387 F.3d 649, 662 (7th Cir. 2004) (affirming in part and reversing in part dismissal of breach of fiduciary duty claims).

Many of the objective facts here are undisputed, such as the contents of critical documents or the timing of certain corporate actions or the contents of communications. Those undisputed facts, however, may support different but still reasonable inferences. The court is not authorized on summary judgment to choose from among conflicting but reasonable inferences. There are even more genuine issues of material *law*. Those issues of law determine which factual disputes might or might not be material to the outcome of the case.

Thus, the cross-motions for summary judgment in this case ask the court to apply an evolving and still fluid set of legal principles and precedents to two truncated and hypothetical versions of the facts. Also, in the likely event of an appeal of a grant of summary judgment to either side, the Court of Appeals would similarly need to deal with a truncated and hypothetical version of the facts rather than with findings of fact based on a preponderance of all the evidence.

The court is fully aware that summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). In this type of case, however, where the motions attempt to present an entire trial on paper, where competing inferences may be at least reasonable, and where the law itself is evolving rapidly, summary judgment does not serve that purpose well. Accordingly, after careful consideration of the parties' extensive evidentiary submissions and detailed briefs, the court finds that both sides' motions for summary judgment on the fiduciary duty issues should be denied. These are Docket Nos. 153 and 147. The court will meet with counsel in the near future to schedule a bench trial addressed to the fiduciary duty issues, without trying yet any issues of individual reliance or damages that might be presented in the event the court finds any breach of fiduciary duty. The court's denial of summary judgment should not be construed as stating any view on the ultimate merits of plaintiffs' claims.

II. *The Release Defense*

Plaintiffs have moved for summary judgment on the release defense that defendants have alleged with respect to several hundred members of the plaintiff class. On this defense, the material facts are undisputed. They show that the defense must fail.

The following facts are undisputed for purposes of plaintiffs' motion for summary judgment on the release defense. In November 2000, IPALCO offered a voluntary early retirement program ("VERP"). This first program, known as VERP I, was limited to 400 employees, but more than 400 asked to participate. VERP I offered increased pension benefits but no change in Thrift Plan benefits. In Article II, Section 2.1 of the VERP I agreements, each participant agreed to release all IPL and related persons and entities from

> any and all claims, liabilities, demands, actions, causes of action or administrative remedies of any kind . . . that might have arisen under . . . any . . . federal or state law, as well as any contractual claims that Employee has or may have on account of, or arising out of, his or her employment with [IPL] and all other matters occurring prior to the date of this Agreement. . . . Employee accepts the benefits set forth in Article I, to which he or she is not otherwise entitled, in full and complete satisfaction of any and all claims or causes of action against [IPL] or any individuals released herein concerning the matters addressed in this Agreement.

The release provision also stated: "It is the intention of the parties that, to the maximum extent permissible by law, Employee is hereby waiving all claims of any kind against [IPL] and releasing [IPL] from any legal or equitable liabilities to him or her with respect to any circumstances existing prior to the execution of this agreement."

In a provision critical to the current motion, Paragraph 5 of the VERP I Agreement stated: "This Agreement shall not affect Employee's benefits under the Thrift Plan."

In June 2001, IPL offered VERP II. Approximately 150 employees agreed to the plan. In October 2001, IPL offered VERP III, in which nine employees participated. The VERP II and VERP III agreements included all of the quoted language from the VERP I agreement.

Between March 2001 and December 2002, an additional 59 employees participated in a severance program. The severance agreements contained release language essentially the same as that quoted above, as well as a broad release of claims under many specified federal laws, including ERISA. With respect to the Thrift Plan, the severance agreements provided: "Nothing in this Agreement shall alter any rights or benefits to which EMPLOYEE is now entitled under any . . . 401(k) savings program maintained by IPL," which includes the Thrift Plan.

Plaintiffs contend that the language in each VERP agreement stating that the agreement "shall not affect Employee's benefits under the Thrift Plan" created an exception to the otherwise broad release, and that the similar exception in the severance agreements for "rights or benefits" under a 401(k) plan had the same effect. Defendants contend the release language includes the claims asserted in this case and that the statement that benefits under the Thrift Plan would not be affected was intended only to make clear that the agreement would not change Thrift Plan benefits. Defendants contend that the agreements distinguish between benefits (and rights, under the severance agreements), which were preserved on one hand, and claims, which were released, on the other hand.

The applicable principles of law are well established. Releases are governed by contract law. *E.g.*, *Beaver v. Grand Prix Karting Ass'n*, 246 F.3d 905, 909 (7th Cir. 2001) (applying Indiana law). The court first seeks to determine the parties' intent by examining the express language of the contract. The court must read the contract as a whole. If the usual methods for attempting to resolve ambiguities do not produce clarity, the court may rely on the rule that ambiguities should be construed against the party who drafted the document. *Taurus Holding Co. of America, Inc. v. Thompson*, 129 F.3d 1268, 1997 WL 724513, *22 (7th Cir. 1997) (adopting district court opinion by McKinney, J.), citing *INB Banking Co. v. Opportunity Options, Inc.*, 598 N.E.2d 580, 582 (Ind. App. 1992); accord, *e.g.*, *Binford v. Shicker*, 553 N.E.2d 845, 848 (Ind. App. 1990).[3]

The VERP language stating that Thrift Plan "benefits" shall not be affected creates an ambiguity about the effect of the release language on claims relating to the Thrift Plan. The severance agreement language stating that "rights and

[3]The Seventh Circuit decision in *Taurus Holding* is unpublished and is not to be cited as binding precedent pursuant to Seventh Circuit Rule 53(b)(2)(iv). The Seventh Circuit's adoption of Judge McKinney's decision provides a convenient source for locating his decision. This court is citing *Taurus Holding* as a district court decision for its persuasive value. Such use is consistent with Seventh Circuit Rule 53.

benefits" under 401(k) plans shall not be altered does the same. The ambiguity results from the fact that benefits and rights to benefits have no content without a right to sue to enforce the rights to benefits. Construing the ambiguous language against the parties responsible for drafting it, the court finds that the saving language effectively nullifies the release language as applied to the claims asserted here.

Defendants offer several arguments to avoid this result. Defendants argue that the claims here arise under ERISA rather than under the Thrift Plan, and that the right to bring a lawsuit cannot be deemed a "benefit" under the plan. Def. Br. at 13-14. These arguments are not persuasive. ERISA authorizes suits to enforce benefits due under plans and to enforce rights under plans. 29 U.S.C. § 1132(a)(1)(B). Under all the agreements, employees retained their benefits under the Thrift Plan. Those benefits would have little or no value under the law if the employees were deemed to have given up their rights to enforce in court their claims to benefits.

Defendants argue that the term "benefits" was carefully chosen to distinguish it from "rights" to sue for ERISA violations that would impair benefits under the Thrift Plan. This argument is too subtle. No employee signing the agreement, which said it "shall not affect" Thrift Plan benefits, would have expected it to release the defendants from claims for breaches of fiduciary duties impairing those same benefits. See *Nelson v. IPALCO Enterprises, Inc.*, 2003 WL

23101792, *6-7 (finding that release defense was so weak that it would not defeat typicality of class representatives). Again, the benefits preserved by the terms of the agreement would have little or no value without the ability to enforce the legal rights that protect those benefits.

IPL vice president for human resources Max Califar drafted the VERP language by adapting language from an earlier program. He testified in his affidavit that he included the language about the Thrift Plan benefits to make clear that the VERP I agreement would not increase an employee's Thrift Plan benefits. He also testified that he discussed the VERP I language with union representatives and stated that same intention. Defendants contend that this interpretation harmonizes the Thrift Plan benefit language with the broad release language.

Califar's testimony about his own and IPL's subjective intentions does not raise a genuine issue of material fact. Courts determine the intent of contracting parties by examining their expressions of intent and their actions, not by considering *post hoc* testimony about unexpressed and subjective intent. *E.g.*, *Crabtree v. Lee*, 469 N.E.2d 476, 479 (Ind. App. 1984) (affirming summary judgment: "The intent relevant in contract matters is not some private and secret intent or reservation, but the outward manifestation of intent."), citing *Wallace v. Rogier*, 395 N.E.2d 297, 301 (Ind. App. 1979) ("The court does not examine hidden intentions secreted in the heart of a person, but rather examines the final expression found in conduct."); accord, *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1439-40 (7th Cir. 1992) (applying Indiana law, disregarding evidence of secret, unexpressed intent, and construing ambiguity against party who drafted contract); *Real Estate Support Services, Inc. v. Nauman*, 644 N.E.2d 907, 910 (Ind. App. 1994) (disregarding evidence of secret intent).

Califar's testimony about his conversations with union representatives addresses objective expressions of intent, but not to the other parties to the agreements. The VERP agreements and severance agreements were individual agreements, not collective bargaining agreements. Defendants have not cited any authority supporting their assertion that communication to a union representative in this situation should be deemed communication to each individual who signed an agreement. See Def. Br. at 18.

Accordingly, the court grants plaintiffs' motion for summary judgment on the defense of release, Docket No. 150.

III. *Testimony of John W. Guy*

Defendants have moved to exclude entirely the proposed expert testimony of John W. Guy, plaintiffs' only expert witness. Guy is an experienced stock broker, investment adviser, and securities arbitrator. In 2001, he considered

AES a highly risky stock. He advised his clients to sell their holdings several months before its price plummeted. Guy has not testified as a paid expert witness before.

Plaintiffs intend to call Guy to testify that AES was an imprudent investment for the Thrift Plan and that the defendants did not adequately or effectively communicate to plan participants the increased risk of AES stock or the fact that the individual defendants were divesting themselves of IPALCO (and thus AES) stock. Although Guy has the benefit of hindsight, he anticipated the problems that AES encountered, and he has attempted to base his opinion on public and objective information available at the relevant times.

Invoking the district court's obligation to act as a "gatekeeper" for expert testimony, the defendants attack Guy's credentials, his methodology, and the relevance of his opinions. See generally *Kumho Tire Co.v. Carmichael*, 526 U.S. 137, 147 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). At least some of his opinions are relevant to the pivotal issues on the merits. Some of the attacks on his credentials and methodology will provide ample fodder for cross-examination, but they do not require exclusion of his testimony.[4] As the Supreme Court cautioned in *Daubert*: "Vigorous

[4]Some of the attacks on Guy deserve no weight. For example, defendants attack Guy because he "admitted that his opinion regarding the relative riskiness of IPALCO versus AES stock was infected by his knowledge that AES's stock subsequently declined in value." Def. Br. at 16, citing Guy Dep. at 111. In his (continued...)

cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596. The court will be the trier of fact in this case, and defendants' arguments may be fully explored at trial, just as plaintiffs' attacks on defense witnesses may be. Defendants' motion to exclude the testimony of John Guy, Docket No. 160, is hereby denied.

IV. *Report of R. Alan Miller*

Defendants have also moved to strike the "rebuttal" expert witness report of R. Alan Miller submitted by plaintiffs, and thus also to prevent plaintiffs from calling Miller as a witness. The case management plan established a deadline for plaintiffs to disclose expert witness reports required by Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. That deadline was extended on plaintiffs' motion. Plaintiffs submitted only Guy's report (a week late, but there is no issue concerning that brief delay). After defendants submitted their own expert witness reports, plaintiffs asked for a status conference to raise an issue concerning the report of defense expert Steven J. Sacher. Sacher opined that the exchange of AES shares for IPALCO shares was automatic and did not require any fiduciary act by any defendant. Plaintiffs argued that Sacher's

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[4](...continued)
answer, Guy acknowledged that what everyone now knows, that AES "tanked," made it difficult to give an intellectually honest answer. In light of Guy's recommendations to his own clients to sell AES at the relevant time, his answer does not undermine his credibility.

opinion conflicted with the court's reasoning in denying defendants' motion to dismiss.

Magistrate Judge Lawrence resolved the issue by authorizing plaintiffs to submit a rebuttal expert report limited to the one issue, identified by plaintiffs in their request for the status conference as follows: "It is accordingly clear that unless IPALCO amended the Plan so as to change the definition of common stock to mean the common stock of AES, it was not possible for the IPALCO stock to remain as a Plan investment in Fund B. It was because of IPALCO's amendments to the Plan that the employee accounts were able to receive shares of publicly traded AES shares, and not as a result of the share exchange as is posited by Defendants' expert."

Plaintiffs responded with Miller's report. His report addresses that limited issue only in passing, in Paragraphs 7 and 8. His report does not actually rebut Sacher on that narrow issue of whether the conversion of IPALCO shares to AES shares called for any action by any defendant in a fiduciary capacity. The Miller report is instead a full-blown damages opinion. It cannot fairly be deemed a rebuttal report.

Plaintiffs bear the burden of proof on the issue of damages. If they intended to offer expert testimony on the subject, the applicable deadline was the original expert witness deadline. Treating the Miller report as a proper rebuttal report would allow evasion of the orderly development of the case, in which plaintiffs should be expected to come forward first with any theory of damages and supporting expert testimony, followed by a response from defendants, and an opportunity for rebuttal.

The court recognizes that defendants have ample time before any trial on damages to take Miller's deposition and to develop further expert evidence to support their views. Plaintiffs have offered no excuse at all, however, for waiting until "rebuttal" to come forward with expert testimony supporting a damage theory. In fact, they still try to present Miller's damage report as a "rebuttal" to Sacher in an effort to evade the clear and substantial violation of the scheduling order. Also, such disregard of the schedule and the orderly development of the case cannot be deemed harmless because it gave the plaintiffs the opportunity to wait for defendants to show their expert cards and because indulgence of plaintiffs' tactics would contribute to further delay, expense, and complication in an already long, expensive, and complicated lawsuit. Under such circumstances, striking the report and barring Miller's testimony is an appropriate sanction.

Unlike the situations in *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000), and *Wilson v. Sundstrand Corp.*, 2003 WL 29938 (N.D. Ill. Jan. 2, 2003), which plaintiffs cite here, plaintiffs had not even disclosed Miller as an expert or provided a preliminary report within any time even close to the scheduled deadlines. Instead, plaintiffs waited until after the defendants produced their own expert reports before disclosing Miller and providing his report, and tried to slip it in as supposed "rebuttal." Such tactics contribute to the length, complexity, and expense of litigation. They do not require the courts' indulgence. See *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 615-16 (7th Cir. 2002) (affirming exclusion of late expert testimony; delay was unjustified, may have been strategic, and allowing it would disrupt and prolong already lengthy litigation). Docket No. 126 is granted, but without costs.

Conclusion

For the reasons stated, the court denies defendants' motion for summary judgment (Docket No. 153), plaintiffs' motion for summary judgment on breach of fiduciary duty (Docket No. 147), and defendants' motion to exclude the testimony of John Guy (Docket No. 160). The court grants the plaintiffs' motion for summary judgment on the release defense (Docket No. 150) and defendants' motion to strike the rebuttal expert report of R. Alan Miller (Docket No. 126).

So ordered.

Date: August 11, 2005

David F Hamilton

DAVID F. HAMILTON, JUDGE
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Southern District of Indiana

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